United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 15-0818**
	)	**Issued: August 4, 2015**
DEPARTMENT OF THE AIR FORCE, RANDOLPH AIR FORCE BASE, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 26, 2015 appellant, through counsel, filed a timely appeal from a January 16, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a ratable impairment caused by the accepted noise-induced hearing loss that would warrant a schedule award; and (2) whether OWCP abused its discretion by denying authorization for hearing aids.

FACTUAL HISTORY

This case has previously been before the Board. In an August 1, 2014 decision, the Board affirmed OWCP's December 24, 2013 decision which found that appellant had not

[1] 5 U.S.C. § 8101 *et seq.*

established entitlement to a schedule award for his employment-related hearing loss, as his hearing loss was not ratable. The Board also affirmed OWCP's finding that appellant was not entitled to a schedule award for tinnitus and that hearing aids were not indicated.[2] The facts and circumstances as set forth in the prior decision and order are hereby incorporated by reference.[3]

In a December 3, 2014 Form CA-7 claim for compensation, appellant again requested a schedule award.

On December 11, 2014 a claims examiner advised appellant that, due to the prior decisions in the case denying schedule award benefits and hearing aids, he needed to follow the appeal instructions appended to the prior decisions.

On December 30, 2014 OWCP received appellant's December 30, 2014 request for reconsideration. Evidence received in support of the request included: duplicate copies of a February 4, 2013 audiogram; audiograms and hearing evaluation reports dated January 16, 2014, and an unsigned hearing loss rating worksheet using the January 16, 2014 audiogram results.

In the January 21, 2014 note, Dr. Edwin D. Meeks, II, a Board-certified otolaryngologist, indicated that appellant has severe bilateral sensorineural hearing loss with 60 percent right speech discrimination and 90 percent left speech discrimination. He indicated that appellant lost at least 60 percent of his hearing and recommended that he be fitted with bilateral hearing aids.

In a December 30, 2014 letter, counsel argued that a new Form CA-7 may be filed at any time to have a new consideration of a schedule award. He stated that a denial of a schedule award at one time does not foreclose appellant from filing a new application with new medical evidence.

By decision dated January 16, 2015, OWCP denied modification of its prior decision. The claims examiner found that the submission of the Form CA-7 in this case appeared to be an attempt to circumvent the appeals process. She noted that counsel had not identified any error in the prior schedule award calculation, nor had he explained how appellant had additional exposure to compensable workplace noise after his retirement from federal employment. The claims examiner noted that the evidence suggested that appellant had a marked increase in the degree of his hearing loss since August 21, 2012. However, since appellant retired from federal service in 2010, that increase in hearing could not be the result of workplace noise exposure. Regarding hearing aids, the decision found that appellant had not submitted sufficient evidence to modify the denial of the request for hearing aids.

[2] Docket No. 14-773 (issued August 1, 2014).

[3] Appellant retired from his federal employment on March 1, 2012. On April 1, 2012 appellant, then a 57-year-old retired powered support systems mechanic, filed an occupational disease claim for hearing loss caused by his 35 years of exposure to noise from jet engines and aerospace ground support equipment. By decision dated September 21, 2012, OWCP accepted that he sustained bilateral sensorineural hearing loss due to employment-related noise exposure but found he was not entitled to a schedule award as the hearing loss was not ratable. It further found that the weight of the medical evidence established that he would not benefit from hearing aids. By decision dated May 1, 2013, an OWCP hearing representative affirmed appellant's September 21, 2012 decision. By decision dated December 24, 2013, OWCP denied modification of its prior decision.

On appeal, counsel argues that the claims examiner's conclusion, that the postemployment hearing loss was not the result of the accepted claim, was improper. He further claims that appellant has the right to file a new application for schedule award anytime there is new evidence of increased impairment.

LEGAL PRECEDENT -- ISSUE 1

In schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of the existing schedule award. When a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration.[4]

A claim for an increased schedule award may be based on new exposure.[5] Absent any new exposure to employment factors, a claim for an increased schedule award may be based on medical evidence establishing the progression of an employment-related condition that has resulted in a greater permanent impairment.[6] The Board has recognized that, if a claimant's employment-related hearing loss worsens in the future, the employee may apply for an additional schedule award for any increased impairment.[7] The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[8]

The schedule award provision of FECA[9] and its implementing federal regulations[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[11]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second, the

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[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Payment of Schedule Awards*, Chapter 2.809 (February 2013). If, on the other hand, the claimant sustains increased impairment at a later date which is due to work-related factors, an additional award will be payable if supported by the medical evidence. In this case, the original award is undisturbed and the new award has its own date of maximum medical improvement, percent, and period.

[5] *A.A.*, 59 ECAB 726 (2008); *Tommy R. Martin*, 56 ECAB 273 (2005); *Rose V. Ford*, 55 ECAB 449 (2004).

[6] *James R. Hentz*, 56 ECAB 573 (2005); *Linda T. Brown*, 51 ECAB 115 (1999).

[7] *Paul Fierstein*, 51 ECAB 381 (2000); *Paul R. Reedy*, 45 ECAB 488 (1994).

[8] *Id.*

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id.* at § 10.404(a).

losses at each frequency are added and averaged.[12] The fence of 25 decibels is then deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.[13] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[14] The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.[15] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[16]

ANALYSIS -- ISSUE 1

In this case, OWCP had previously accepted bilateral sensorineural hearing loss due to employment-related noise exposure. The Board previously affirmed its finding, however, his hearing loss was not severe enough to be ratable for a schedule award. Appellant filed a new Form CA-7 compensation claim for a schedule award which OWCP denied following merit review.[17] The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss due to his employment.

Appellant submitted a copy of a February 4, 2013 audiogram, which was previously of record and was already considered in OWCP's December 24, 2013 decision, and affirmed by the Board. Thus, this audiogram does not establish a basis for granting a schedule award.

Appellant also submitted audiograms and hearing evaluation reports dated January 16, 2014 and an unsigned hearing loss rating worksheet using the January 16, 2014 audiogram results. However, these reports, contained no identification or certification of the examiner. Audiologists are not included among the healthcare professionals recognized as physicians under FECA.[18] Further, none of the newly submitted audiograms, hearing evaluation reports, or hearing loss rating worksheets were accompanied by a physician's report addressing the causal relationship of appellant's hearing loss.[19] A claimant may be entitled to an award for an

[12] A.M.A., *Guides* 250 (6th ed. 2009).

[13] *Id.*

[14] *Id.*

[15] *Supra* note 12 at 251.

[16] *Horace L. Fuller*, 53 ECAB 775 (2002).

[17] The Board finds in this case that appellant made a proper claim for an increased schedule award or a schedule award as there was a prior denial of a schedule award.

[18] *Thomas O. Bouis*, 57 ECAB 602 (2006). Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). *See Joshua A. Holmes*, 42 ECAB 231 (1990) (an audiogram prepared by an audiologist must be certified by a physician before it can be used to determine hearing loss).

[19] *Id.*

increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[20] This evidence does not establish appellant's claim.

While the January 21, 2014 letter from Dr. Meeks indicates that appellant has severe bilateral sensorineural hearing loss, Dr. Meeks does not discuss the causal relationship of that hearing loss. As noted, a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[21] As such, Dr. Meeks' letter does not establish appellant's claim for a schedule award.

On appeal, counsel argues that the claims examiner's conclusion that the postemployment hearing loss was not caused by the accepted injury was improper. The issue of whether an increase in hearing loss after exposure to hazardous noise has ceased is a medical determination. Appellant has provided no medical evidence to establish a ratable hearing loss. Counsel further argues that appellant has the right to file a new application for schedule award anytime there is new evidence of increased impairment. A claimant may request a schedule award or an increased schedule award based on evidence of new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.[22] Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award.[23]

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduces the degree or the period of any disability or aid in lessening the amount of any monthly compensation.[24] OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.[25]

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable

[20] *See supra* note 7.

[21] *See id.*

[22] *Paul R. Reedy, supra* note 7.

[23] *B.K.*, 59 ECAB 228 (2007).

[24] 5 U.S.C. § 8103.

[25] OWCP has broad discretionary authority in the administration of FECA and must exercise its discretion to achieve the objectives of section 8103. *Marjorie S. Greer*, 39 ECAB 1099 (1988). *See also M.M.*, Docket No. 13-1819 (issued February 19, 2014).

deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[26]

ANALYSIS -- ISSUE 2

The Board has previously affirmed in its August 1, 2014 decision that OWCP had not abused its discretion by denying appellant's request for hearing aids. The Board noted that there was no medical evidence of record to substantiate that appellant required hearing aids. Following the Board's decision, appellant submitted to OWCP a January 21, 2014 letter from Dr. Meeks which recommended that appellant be fitted with bilateral hearing aids. This recommendation was not supported by any further explanation. As Dr. Meeks offered no medical rationale to explain why appellant needed hearing aids due to the accepted nonratable hearing loss, OWCP did not abuse its discretion by denying appellant's request for hearing aids. There is no probative medical evidence of record that appellant should have hearing aids.[27]

CONCLUSION

The Board finds that appellant failed to establish an additional schedule award for his employment-related hearing loss. The Board also finds that OWCP did not abuse its discretion by denying appellant's request for hearing aids.

[26] *J.C.*, Docket No. 13-1413 (issued October 22, 2013).

[27] *See J.M.*, Docket No. 14-982 (issued August 26, 2014).

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board